(iii) the applicant has been in custody since August 20, 1975 and would have been in custody for approximately six months before the trial.

Be that as it may, I am of the view that the exceptional and special reasons in this case arise from the fact that the applicant is to be tried by the Sessions Court in the exercise of its special jurisdiction under section 63(3) of the Subordinate Courts Act, 1948. This case may, therefore, be distinguished from *Shanmugam* v. *Public Prosecutor, supra,* because in that case, the applicant was charged before the Subordinate Court for a preliminary enquiry with a view to committal to the High Court whereas in this case, the applicant is before the Subordinate Court for summary trial. The special jurisdiction given to the Sessions Court to try rape cases was conferred by the Courts (Amendment) Act, 1971 which came into force on April 30, 1971. So far only two Presidents of the Sessions Court have been conferred with this special jurisdiction, the Kuala Lumpur President being one of them. This means that in most States, rape cases are still triable by the High Court. Where it is triable by the High Court, bail may be granted pending trial in exceptional cases at the discretion of the judge under section 389 of the Criminal Procedure Code but where it is triable by a President of a Sessions Court with special jurisdiction, no such discretion is conferred on the President. In my view, this is an anomalous position created by increasing the jurisdiction of the President under the Subordinate Courts Act 1948 without making consequential changes to the Criminal Procedure Code. Further, by section 64(1)(b) of the Subordinate Courts Act, the maximum sentence which a President with special jurisdiction may pass is seven years' imprisonment. In rape cases, no power has been given to the Sessions Court to impose the maximum sentence of life imprisonment by the proviso to section 64(1) nor is such a power given by section 64(2) which is restricted to the exercise of powers under section 63(1) but not under section 63(3) of the Subordinate Courts Act. It may be said then that the applicant is no longer charged with an offence punishable with life imprisonment. A consequence of the current state of the law has been that in Kuala Lumpur it is now almost standard practice for persons who are charged before the Special Sessions Court to apply to the High Court for bail pending trial. In most cases, bail is granted particularly in cases when the trial dates are fixed many months after the date of first appearance in court on account of the long list of cases pending at the Special Sessions Court, Kuala Lumpur. As a matter of principle, I think a court that has been conferred with jurisdiction to try a case should also be given discretionary powers to grant bail. This would be in keeping with the provisions of the Criminal Procedure Code, where magistrates possess the unfettered power to grant bail in all cases including cases not triable by them, except offences punishable with death or life imprisonment where only a judge may grant bail. It seems to me that the time has come to consider appropriate amendments to the Criminal Procedure Code enabling a President of a Sessions Court who has been conferred with special jurisdiction the discretionary powers to grant bail in respect of all cases triable by him.

In the instant case, had it been triable by me, I would exercise my discretion to grant bail pending trial. I have no doubt that the learned president would have done the same if he had the power. I would therefore allow this application on exceptional and special reasons and admit the applicant to bail in the sum of $1,000 in one surety to appear at the Special Sessions Court, Kuala Lumpur on February 13, 1976.

Application allowed.

Solicitors: *Manuel & Segran.*

LIEW CHEE YUNG v. CHANG LUN YUAN & ANOR.

[O.C.J. (Gill C.J.) December 17, 1975]
[Muar — Civil Suit No. 15 of 1973]

Tort — Accident — Negligence — Action for damages for personal injuries — Quantum thereof.

Damages — Personal injuries — Leg — Fracture — Wound — Shortening by 1¼ cm.

This was an action for damages for personal injuries suffered by the plaintiff as a result of a road accident caused by the alleged negligent driving of the second defendant. The first defendant was the owner of the motor lorry driven by his servant, the second defendant. The plaintiff had an 8 cm wound over the front of the right leg. There was also a 17 cm long operation scar over the same region. There was about 2.5 cm wasting of the girth of the right calf, with the result that he walked with a definite limp. He was able to squat and rise up reasonably well but he could not run easily. There was some outward bowing of the right leg caused by the shortening of the leg by 1¼ cm. There was restriction of movements in the right ankle and foot. The movement in the right ankle was only half the normal range and the main limitation was in dorsiflexion. There was no eversion and inversion at the subtalar joint was only half the range. It was very likely that osteoarthritis would develop in the ankle joint over the years.

Held: (1) on the facts the second defendant was entirely to blame for the accident;

(2) the plaintiff should be allowed general damages at $14,000 and special damages in the sum of $13,450.

Case referred to:-

(1) *Romford Ice and Cold Storage Co. Ltd.* v. *Lister* [1955] 3 All E.R. 460.

CIVIL SUIT.

S. C. Chan for the plaintiff.

Thakurta for the first defendant.

Abdul Razak bin Ahmad for the second defendant.

Gill C.J. (Malaya): This was an action for personal injuries suffered by the plaintiff in a road accident involving motor lorry No. JF. 8601, which belonged to the first defendant and was being driven by the second defendant as his servant at the time of the accident.

The accident occurred at the 51st mile along Ayer Hitam/Simpang Rengam on November 14, 1969 at about 1 p.m. when the lorry was travelling in the direction of Simpang Rengam. The plaintiff was also

employed as an attendant as well as driver of the lorry, and he was sleeping in the cab of the lorry by the side of the driver when the accident took place, with the result that he did not know how the accident happened. He was thrown forward and pinned down in the lorry near the gear box as a result of the accident. When he was awakened by the accident he found that the driver was not in his seat and that the lorry had gone into the grass by the side of the road. He was taken to Kluang Hospital where he saw the driver who told him that there was a vehicle overtaking his lorry from behind as a result of which his lorry went off the road into the grass. According to the plaintiff the weather was fine at the time of the accident.

A report was made about the accident by the second defendant at Simpang Rengam police station at about 4.05 p.m. on November 15, 1969. In his report he said that when he arrived at the place where the accident took place he heard an explosion sound, whereupon he applied the brakes and the lorry went into the grass verge on the left side of the road facing Johore Bahru. In his evidence in court he said that a car coming from the opposite direction had encroached on to his path at the 51st milestone. On seeing this he swerved to the left in order to avoid colliding with the car, and when he was on the left grass table his lorry went off the road because the earth there was soft and tilted to one side. He went on to say that the plaintiff was sleeping on the seat on his left at the time of the accident and was thrown forward near the gear box. He confirmed that he was employed by the first defendant who was the owner of the lorry. He also confirmed that the plaintiff was also employed by the first defendant.

In his examination-in-chief the second defendant said that when he made the report to the police he mentioned that a car coming from the opposite direction had encroached on to his path and that he did not know why the report did not say so. Under cross-examination he said that he was aware that if he swerved suddenly his lorry would tilt. He further said that he knew that if he did not swerve the consequences for him and the plaintiff would have been less severe.

In view of what the second defendant told the plaintiff soon after the accident as to how the accident happened and in view of what he said in his report to the police, I found it impossible to believe his story in court that the accident had taken place because a car coming from the opposite direction had encroached on to his side of the road. It was clear that the lorry went off the road when the second defendant was in control of it. That the lorry went off the road was indicative of some sort of negligence on the part of the second defendant . The thing spoke for itself. It was therefore for the second defendant to show that he was in no way negligent. In my opinion he failed to do so. As I have already said, I was not impressed with his evidence in court. It was clear that he was hiding something. It was put to him that he was speeding and lost control of the lorry. He denied the suggestion, but I formed the opinion that he must have been travelling fast as a result of which he lost control of the lorry at the scene of the accident where there was a slight bend in the road. In the result I found the second defendant entirely to blame for the accident.

The injuries suffered by the plaintiff are set out in the two medical reports which were included in the agreed bundle of documents. He suffered a compound fracture of his right tibia and fibula at the junction of the middle and lower third. The fracture was reduced but X-rays on February 26, 1970 and March 5, 1970 showed non-union of the fracture ends. He was readmitted to hospital on May 4, 1970 and an open reduction with plating was done. He was proclaimed fit for light duty from August 27, 1970 to September 9, 1970 and full duty thereafter.

The second medical report on the plaintiff was issued after his re-examination on January 10, 1972. That report gives the following conclusions. He had an 8 cm wound over the front of the right leg. There was also a 17 cm long operation scar over the same region. There was about 2.5 cm wasting of the girth of the right calf, with the result that he walked with a definite limp. He was able to squat and rise up reasonably well but he could not run easily. The squatting was difficult because of restriction of ankle movements. There was some outward bowing of the right leg and this was the main cause of the shortening of the leg by 1½ cm. There was restriction of movements in the right ankle and foot. The movement in the right ankle was only half the normal range and the main limitation was in dorsiflexion. There was no eversion and inversion at the subtalar joint was only half the range. It is very likely that osteoarthritis will develop in the ankle joint over the years.

As regards special damages, counsel agreed to the sum of $200 in respect of the first five items in paragraph 4 of the statement of claim. They also agreed that total loss of earnings should be for 8½ months after the accident. Although the plaintiff and the second defendant were severely cross-examined as to their monthly earnings, it seemed clear to me on the evidence that the first plaintiff earned approximately $500 a month. I therefore allowed a sum of $4,250 as actual loss of wages for the period of 8½ months agreed on. For the period October 1970 to date of trial, a period of 60 months, I allowed general diminished earnings at an average of $150 a month making a total of $9,000. The plaintiff was able to get a job after the accident but because of the injuries it will take a fairly long period before he will be in a position to earn as much as he did before the accident. I thus allowed special damages in the sum of $13,450.

With regard to general damages, counsel for the defendants conceded that at least a sum of $6,000 should be allowed for pain and suffering including shortening of leg by 1½ cm and loss of amenities. Counsel for the plaintiff said that a sum of $10,000 would be an appropriate sum. I allowed a sum of $8,000, which I considered to be a reasonable sum in all the circumstances of the case. I thus assessed general damages at $14,000.

In the result I gave judgment for the plaintiff against both defendants in the sum of $27,420 with interest on $13,450 at 3% per annum from the date of the accident and on $8,000 at 6% per annum from the date of service of writ to date of judgment, together with costs.

The judgment against the first defendant was entered on vicarious liability. No evidence was called on behalf of the first defendant. His counsel contended that if there was negligence on the part of the second defendant, perhaps the fact that the plaintiff was sleeping when the accident took place should be considered as contributory negligence on his part. I rejected that contention because all the indications were that if the plaintiff had been sitting up he might have even suffered more serious injuries.

Counsel for the first defendant also submitted that if the first defendant was held liable through vicarious liability he was entitled to an indemnity or contribution for the second defendant who was brought in as a third party. For this he relied on the case of *Romford Ice and Cold Storage Co. Ltd.* v. *Lister*.[1] That was a case in which evidence was produced to show that by condition 2 of the Employees' Liability Policy the underwriters were allowed to prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise. In the present case no such evidence was produced. Indeed, as I have already said, no evidence whatsoever was produced on behalf of the first defendant. Moreover, in the amended statement of claim in the present case third party procedure was abandoned and the second defendant was added as such by an order of court. In the circumstances I felt that I could make no separate order against the second defendant in his original capacity as third party, leaving it open to the first defendant to take such further action as he thought fit as regards indemnity or contribution from the second defendant.

Order accordingly.

Solicitors: *Murphy & Dunbar; Allen, Gledhill & Ball; Ong Ban Chai & Co.*